

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

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75-1078

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Appellee,

-v-

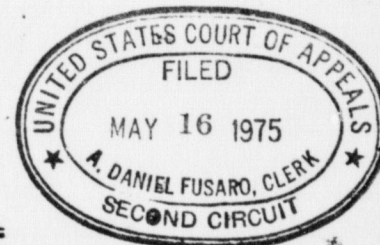
JOHN BENIGNO,

Appellant.

*On Appeal From The United States District Court
For The Southern District Of New York*

Appellant's Appendix

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DP 119

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

:

:

-v-

:

**BRYAN CANNIFF, and
JOHN BENIGNO,**

:

INDICTMENT

74 Cr. 944

:

Defendant .

:

-----x

The Grand Jury charges:

1. From on or about the **1st** day of **September, 1973,**
and continuously thereafter up to and including the date of
the filing of this indictment, in the Southern District of
New York,

**BRYAN CANNIFF and
JOHN BENIGNO,**

the defendant, and others to the Grand Jury unknown, unlaw-
fully, intentionally and knowingly combined, conspired, confederated
and agreed together and with each other to violate Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said
defendant, unlawfully, intentionally and knowingly would distribute
and possess with intent to distribute Schedule
narcotic drug controlled substances the exact amount thereof
being to the Grand Jury unknown in violation of Sections 812,
841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

BP:js

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York:

1. On or about October 12, 1973, defendant, **JOHN BURGESS** had a telephone conversation with an undercover agent.
2. On or about October 17, 1973, defendant, **BRIAN GANLEY** entered Friday's Restaurant at 1132 First Avenue, New York, New York and had a conversation with an undercover agent.
3. On or about October 17, 1973, defendant, **BRIAN GANLEY** delivered a package containing a "sample" of cocaine to an undercover agent at 63rd Street near First Avenue, New York, New York.
4. On or about October 17, 1973, defendant, **BRIAN GANLEY** possessed a package containing approximately 27.91 grams of cocaine.

(Title 21, United States Code, Section 846)

ONLY COPY AVAILABLE

NP:js

~~SECOND~~ COUNT

The Grand Jury further charges:

On or about the **17th** day of **October, 1973,**
in the Southern District of New York,

**BRYAN CASHLY and
JOHN BERLINO,**

the defendant, , unlawfully, wilfully and knowingly did
distribute and possess with intent to distribute a
Schedule **II** narcotic drug controlled substance, to wit,
approximately .34 grams of cocaine.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)

MP:js

~~REDACTED~~ COUNT

The Grand Jury further charges:

On or about the **17th** day of **October, 1973,**
in the Southern District of New York,

ERIC GANLEY and
JOHN BARKER,

the defendant, , unlawfully, wilfully and knowingly did
~~distribute and possess~~ possess with intent to distribute a
Schedule **II** narcotic drug controlled substance, to wit,
approximately 17.91 grams of cocaine.

(Title 21, United States Code, Sections 812,
841(a)(1) and 841(b)(1)(A).)

~~REDACTED~~
Foreman

~~REDACTED~~
PAUL J. GILMAN
United States Attorney

1 lhh 1

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2 UNITED STATES OF AMERICA

3 vs.

4 BRYAN CANNIFF and
5 JOHN BENIGNO

6 January 14, 1975,
7 9:30 A.M.

8 --

9 (In open court, jury present.)

10 THE COURT: Good morning, members of the jury.
11 The reason for the announcement and that procedure is so
12 you will not be distracted from the law that I am about to
13 charge you. You are about to enter upon your final duty,
14 which is to decide the fact issues in this case. As I
15 told you in my preliminary instructions at the beginning
16 of the trial, your principal function during the taking of
17 testimony would be to listen carefully and observe each witness
18 as he testified, and it has been evident to me that you have
19 faithfully discharged this duty. We have now reached the
20 point of the case where all the evidence has been presented
21 and the closing arguments of the lawyers have been made.
22 Shortly, after I have concluded my instructions to you on
23 the law, you will retire to deliberate upon your verdict,
24 and you are to perform this final duty in an attitude of
25 complete fairness and impartiality. You are to appraise the
 evidence calmly and deliberately, and, as was emphasized

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1 lhh 2

2 by me at the time of your selection as jurors, without
3 bias or prejudice, with respect either to the government
4 or to the defendants as parties to this controversy. The
5 fact that this prosecution is brought in the name of the United
6 States of America entitles the government to no greater
7 consideration than that accorded to any other party in the
8 case, and, by the same token, it is entitled to no less
9 consideration. All parties stand as equals before the bar
10 of justice. Your final role is to pass upon and decide
11 the fact issues in the case. You, the members of the jury,
12 are the sole and exclusive judges of the facts. You pass
13 upon the weight of the evidence, you determine the credibility
14 of the witnesses, you resolve such conflicts as there may
15 be in the testimony and you draw whatever reasonable in-
16 ferences that are to be drawn from the facts as you determine
17 them to be. My function at this point is to instruct you
18 on the law, and it is your duty to accept these instructions
19 of law and apply them to the facts as you determine them.
20 The logical result of that application will be your
21 verdict in this case. With respect to any fact matter, it
22 is your recollection and yours alone that governs. Anything
23 that counsel either for the government or for the defendants
24 may have said with respect to any matters in evidence, that
25 is as to any factual matter, whether stated in a question,

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1 in argument or in summation, is not to be substituted
2 for your own independent recollection. So too anything
3 that the court may have said during the course of the trial
4 with respect to a fact matter, or that I may say during
5 the course of these instructions, is not to be taken
6 in substitution for your own independent recollection
7 which governs at all times.
8

9 Before I get to the precise charges in the in-
10 dictment, I believe that a number of preliminary observations
11 are in order. In determining the facts, you should not be
12 influenced by rulings that the court may have made during
13 the trial. These rulings dealt solely with matters of law
14 and not questions of fact. Counsel for both sides not only
15 have the right but indeed they had the duty to press
16 whatever legal objections they believe exist as to the
17 admission of offered evidence. The court's rulings on
18 objections made either by the attorney for the government
19 or the attorneys for the defendants are not to be considered
20 by you. Of course, as I told you at the outset of my
21 instructions, where I have sustained an objection to a
22 question, you must not speculate on what the witness would
23 have said had he been permitted to answer; nor may you draw
24 any inference from the wording of the question or that it
25 was asked. Similarly, where any testimony has been stricken,

1 lhh 4

2 it is not evidence, and you are bound to disregard it. However,
3 you must remember that in ruling on objections the court was
4 deciding questions of law and not questions of fact, which
5 are for you alone. During the course of the trial there
6 were occasions when I admonished either the attorney for the
7 government or the attorneys for the defendants. Sometimes
8 in the ardor of advocacy counsel say or do things which in
9 calmer moments they would not have said or done. Any such
10 incidents must play no part in your deliberations. The
11 personalities of the lawyers or of the judge have nothing to
12 do with the case. I recognize that a judge can have a
13 great deal of influence with a jury, and I want you
14 specifically to understand that I have no opinion with
15 respect to the guilt or innocence of these defendants. If
16 you do think that you have gleaned some indication as to
17 my opinion of the case either from any questions I may
18 have asked or from my expression or tone of voice, disregard
19 it entirely. The court has no opinion as to the veracity
20 or credibility of the witnesses or the merits of the case.
21 You are the judges of the facts and you are the sole
22 judges of the guilt or innocence of these defendants. I
23 am merely a judge of the law. The fact issues must be
24 decided by you solely and only within the framework of the
25 evidence and the principles of law that apply.

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2 Finally, don't single out any one instruction
3 of mine as stating the law alone. Take them all into account
4 after you have heard all of them. You are to consider only
5 the evidence in this case, and that evidence consists of
6 the sworn testimony of the witnesses, the exhibits which
7 have been received in evidence, the facts which have been
8 stipulated and the presumptions which I will tell you about
9 in these instructions, such as the presumption of innocence.
10 But while you are to consider only the evidence in the
11 case, you are not limited to the bald statements of the
12 witnesses. On the contrary, you are permitted to draw
13 from the facts which you find have been proved such reasonable
14 inferences as seem justified to you in the light of your
15 own experience. An inference is merely another word for
16 a conclusion which reason or common sense leads you to
17 draw from the facts that have been proved here. In considering
18 the evidence, you must remember, as I told you at the beginning
19 of this trial that the indictment is only a formal method
20 of accusing a defendant of the crime charged, and it is not
21 evidence against the defendant nor is any weight to be given
22 to the fact that an indictment has been returned against
23 the defendants.

24 Generally there are two types of evidence from
25 which a jury may properly find the truth as to the facts

of a case. One is direct evidence, such as the testimony of a witness, somebody who saw or heard something done or said; and the other is indirect or circumstantial evidence, and that is the proof of a chain of circumstances pointing to the existence of non-existence of certain facts. Generally the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with all the evidence in the case, both direct and circumstantial. We have a rather common example, and I guess I have used it in every case in which I have charged a jury. To me it is repetitious and there are ways of finding other ones, but to you who will hear it for the first time it may be helpful to you in deciding or finding out what I mean by circumstantial evidence, that is a chain of circumstances pointing to the existence or non-existence of certain facts. I want you to assume that when you came to court this morning, it was the bright sunshiny day that it is out there. From that you could look out and see that the sun is shining and that it is a nice, lovely day. That would be direct evidence. Let us assume that we were in one of those modern courtrooms that we have right off the front entrance to this building, a courtroom without windows in it where you can't see outside. As I say, assume it is the type of day it is when

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1 you came in. Let's assume that after we were there for
2 an hour or so, a spectator walked into the courtroom and
3 you could see from him that his clothes were wet and damp.
4 Assume that a minute or two later another spectator came in
5 and he has a hat in his hand and his umbrella in his hand,
6 he takes his hat off and the hat is dripping water and
7 the umbrella is dripping water. You could assume from
8 that that even though when you came in here an hour before
9 it was a bright sunshiny day, that now it was raining outside.
10 That's what we call circumstantial evidence. A chain of
11 circumstances that lead you to conclude that a fact exists
12 or doesn't exist. As I told you, generally the law makes
13 no distinction between direct evidence and circumstantial
14 evidence, but only requires that you find the facts in
15 accordance with all the evidence in the case. I have in-
16 dicated to you the presumption of innocence. The de-
17 fendants have entered a plea of not guilty to the charges
18 of the indictment. And, thus, the burden is on the prose-
19 cution to prove guilt beyond a reasonable doubt. This burden
20 never shifts to a defendant, for the law never imposes
21 upon a defendant in a criminal case the burden or duty of
22 calling any witnesses or producing any evidence. As I told
23 you during your selection as jurors in my preliminary
24 instructions, the law presumes a defendant to be innocent of
25

All

2 crime, and, thus, a defendant, although accused, begins
3 the trial with no evidence against him, and the law permits
4 nothing but legal evidence presented before you as jurors
5 to be considered in support of any charge against a defendant.
6 The presumption of innocence remains with the defendant
7 throughout the trial and your deliberations, until such time,
8 if ever, as you are unanimously satisfied of guilt beyond
9 a reasonable doubt. Thus, the presumption of innocence alone
10 is sufficient to acquit a defendant unless and until, after
11 careful and impartial consideration of all the evidence
12 in the case, you as jurors are unanimously convinced of
13 a defendant's guilt beyond a reasonable doubt. Before I
14 get to the specific charges in the indictment and read to
15 you the parts of it as they apply to the specific charges
16 here, I want to recall for you the list of witnesses and
17 the order in which they appeared. It's been a relatively
18 short trial, but this may be helpful to you. I do not
19 propose to go over the evidence or comment on it with you,
20 it's been done by counsel in their summations and it should
21 be in your minds. Our first witness was Joseph C. Sullivan,
22 a special agent for the Drug Enforcement Agency. During the
23 course of his testimony there were certain stipulations
24 entered into among the attorneys here with respect to the
25 chain of custody of Exhibits 1, 2 and 3. Following Mr.

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1 Sullivan we had Daniel Miller. He was followed on the stand
2 by Jeffrey Hall, another special agent for the Drug En-
3 forcement Agency, and his testimony was interrupted so that
4 we could take two witnesses out of turn, Mr. Albert
5 Baragwanath, a museum curator and had been an employer of
6 Mr. Canniff, as was Mr. Sempliner who followed him on the
7 stand, who was in the design business. We then resumed
8 Mr. Hall's testimony and then following Mr. Hall's testimony
9 the chemist, Joseph Barbato, testified. Mr. Hall was recalled
10 with respect to the payments to Mr. Miller which he was going
11 to look up after his original appearance on the stand. The
12 government then rested. The defendant Bryan Canniff took
13 the stand. He was followed by Ron Smerechniak who was
14 the manager at one time of the Broome Street bar. He was
15 followed on the stand by the defendant John Benigno, and after
16 which both defendants rested and the the government called
17 in rebuttal Agent Hall and finally the last witness who was
18 Edward Magnuson, another special agent for the Drug Enforcement
19 Agency.
20

21 I believe that's the order in which the witnesses
22 appeared before you. You can't take these instructions in
23 a vacuum, but you must apply them to the facts of the case.
24 The indictment here contains three counts or charges. A
25 separate crime or offense is charged in each count of the

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2 indictment. Each offense and the evidence pertaining to
3 it should be considered separately. The fact that you may
4 find a defendant guilty or not guilty of one of the offenses
5 charged should not control your verdict as to the other
6 offenses charged, and also it is your duty to give separate
7 personal consideration to the case of each individual defendant.
8 When you do so, you should analyze what the evidence in the
9 case shows with respect to that individual, leaving out
10 of consideration entirely any evidence admitted solely
11 against some other defendant. Each defendant is entitled
12 to have his case determined from evidence as to his own acts
13 and statements and conduct, and any other evidence in the
14 case which may be applicable to him.

15 The first charge, and I will read it to you in
16 two separate parts and explain it to you later, the first
17 charge of the indictment, the first count of the indictment
18 reads as follows:

19 The Grand Jury charges:

20 1. From on or about the 1st day of September,
21 1973, and continuously thereafter, up to and including the
22 date of the filing of this indictment in the Southern
23 District of New York, Bryan Canniff and John Benigno, the
24 defendants, and others to the Grand Jury unknown, unlawfully,
25 intentionally and knowingly combined, conspired, confederated

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and agreed together and with each other to violate Sections 812, 841A1 and 841B1A of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute schedule narcotic drug controlled substance, the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841A1 and 841B1A of Title 21, United States Code. That's the first part of the count.

The other refers to overt acts which is a part of the conspiracy count but which I will charge you separately following my charge on conspiracy. Before you may find a defendant guilty of conspiracy as charged in the first count of the indictment, you must find each of the following three elements beyond a reasonable doubt.

First, that some time between approximately September 1, 1973, and October 7, 1974, the dates specified in the indictment, an agreement or understanding existed between any two or more named conspirators to commit at least one of the crimes charged in the indictment, to wit, the illegal possession with intent to distribute or distribution of cocaine in New York City. In short, the government must prove that a conspiracy exists with respect to the distribution of narcotics. That's the first element.

1
2 The second element, that the particular defendant,
3 Bryan Canniff and John Benigno, knowingly and wilfully became
4 a participant in the conspiracy, with knowledge of at least
5 one of its criminal purposes.

6 The third element, that one of the conspirators
7 knowingly committed at least one of the overt acts set forth
8 in the indictment, at or about the time alleged in furtherance
9 of the conspiracy and that at least one of those overt acts
10 was committed in the Southern District of New York, which
11 for our purposes includes Manhattan or New York County.
12 With respect to each of these elements, some further ex-
13 planation is required.

14 First, as to the existence of a conspiracy, simply
15 to find a conspiracy is a combination of two or more persons
16 by concerted action to accomplish some unlawful purpose.
17 A conspiracy is an unlawful combination or agreement to
18 violate the law. Whether or not the persons charged in
19 the indictment accomplished what it is alleged they conspired
20 to do is immaterial to the question of guilt or innocence.
21 Thus, the success or lack of success of the conspiracy
22 does not matter, for a conspiracy is a crime entirely separate
23 and distinct from the substantive crime that may be the goal
24 of the conspiracy. A conspiracy has sometimes been called
25 a partnership in criminal purposes in which each member

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1 lhh 13

2 becomes the agent of every other member. To establish
3 the existence of a conspiracy, however, the government
4 is not required to show that two or more persons sat around
5 a table and entered into a solemn compact, orally or in
6 writing, stating that they have formed a conspiracy to
7 violate the law, setting forth the details of the plan,
8 the means by which it is to be carried out or the part to
9 be played by each conspirator. Your common sense will tell
10 you that when men undertake to enter a conspiracy, much
11 is left to unexpressed understanding. Conspirators do not
12 usually reduce their agreements to writing or acknowledge
13 them before a notary public, nor do they publicly broadcast
14 their plans. A conspiracy is almost always characterized
15 by secrecy.

16 In determining the existence or non-existence of
17 the conspiracy, it is not required that you find that each
18 and every one of the alleged co-conspirators joined in the
19 conspiracy. It is sufficient if you find beyond a reasonable
20 doubt that two or more persons, in any matter, through
21 any contrivance, impliedly or tacitly, came to a common
22 understanding to violate the law. In determining whether
23 there has been an unlawful agreement, you may consider acts
24 and conducts which are done to carry out a criminal purpose.
25 Usually the only evidence available is that of disconnected

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1 lhh 14

2 acts on the part of the alleged individual conspirators,
3 which acts you may find, when taken together in connection
4 with each other and with the reasonable inferences flowing
5 therefrom, show a conspiracy or agreement to secure a particular
6 result as satisfactorily and conclusively as more direct
7 proof. If upon consideration of all the evidence, direct
8 and circumstantial, you find beyond a reasonable doubt
9 that the minds of at least two of the alleged conspirators
10 met in an understanding way, and that they agreed, as I have
11 explained a conspiratorial agreement to you, to work together
12 in furtherance of the unlawful scheme alleged in the indictment,
13 and that thereafter at least one of the co-conspirators
14 did any overt act to effect the object of the conspiracy,
15 then proof of the existence of the conspiracy is established.
16 In this connection, as I have told you, it is not necessary
17 for the government to prove the success of the conspiracy
18 in order to establish a violation of the conspiracy statute.
19 As a conspiracy is basically the agreement to violate the
20 law, it may exist even though the final objectives were
21 never accomplished. In connection with this further element,
22 some further comments may be helpful.

23 You will recall that I defined a conspiracy as a
24 combination of two or more persons by concerted action to
25 accomplish some unlawful purpose. Thus, before you may find

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1
2 that a conspiracy existed, you must also find that what the
3 conspirators intended to do would have violated one or more
4 federal laws if they had succeeded in accomplishing what
5 they set out to do.

6 Finally, with respect to the existence of the
7 conspiracy, the indictment alleges that the conspiracy
8 commenced on or about September 1, 1973, and continued
9 up to the date of the filing of the indictment on October 7,
10 1974. It is not necessary for the government to prove that
11 the conspiracy started and ended on those specific dates.
12 It is sufficient if you find that in fact a conspiracy
13 was formed and that it existed for some substantial time
14 within the period set forth in the indictment, and that at
15 least one overt act was committed during that period.
16 A conspiracy, once formed, continues for as long as the
17 evidence shows the conspirators intended to continue it.
18 Such intention may be inferred from such activities, if
19 any, of the conspirators which you find to be in furtherance
20 of the purpose of the conspiracy.

21 The second element, participation in the con-
22 spiracy. If you find beyond a reasonable doubt that the
23 conspiracy charged in the indictment existed, you must
24 determine who its members were. In determining whether
25 a defendant became a member of the conspiracy, you must

1 lhh 16

2 determine not only whether he participated in it but whether
3 he did so with knowledge of its unlawful purpose. Did
4 he join with an awareness of at least some of the aims and
5 purposes of the conspiracy. Knowledge is a matter of in-
6 ference from facts proved. It is not necessary that a
7 defendant be fully informed as to the details of the scope
8 of the conspiracy in order to justify an inference of knowledge.
9 A defendant need not know the full extent of the conspiracy
10 and all of its activities and actors. However, mere
11 association with one or more of the members of the con-
12 spirators does not make one a member of a conspiracy nor
13 is knowledge without participation sufficient. What is
14 necessary is that the defendant participate with knowledge
15 of at least some of the purposes of the conspiracy and
16 with the intent to aid in the accomplishment of those
17 unlawful ends. In determining whether a conspiracy existed,
18 you should consider the acts and declarations of all the
19 alleged participants. However, in determining whether a
20 particular defendant was a member of the conspiracy, you
21 may consider only his own acts and statements. He cannot
22 be bound by the acts or declarations of other alleged
23 participants until and unless you are satisfied beyond
24 a reasonable doubt that the conspiracy existed and that the
25 defendant you are then considering was one of its members.

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1 lhh 17

2 In other words, your determination as to the participation
3 in the conspiracy of each defendant must be based upon
4 what you find to have been his own actions, his own conduct,
5 his own statements or declarations, his connection with the
6 acts and conduct of other alleged co-conspirators, and the
7 reasonable inferences to be drawn therefrom. You will recall
8 that during the course of the trial some evidence was received
9 subject to connection. Thus, testimony concerning acts
10 or statements of one alleged co-conspirator done or said
11 in the absence of other alleged co-conspirators, although
12 received in evidence without limitation against the alleged
13 co-conspirator who did the act, made the statement or
14 omission, was admitted into evidence as to the absent
15 alleged co-conspirator on a conditional or tentative basis.
16 If you find beyond a reasonable doubt that a conspiracy
17 existed, and if you also find beyond a reasonable doubt
18 that a particular defendant was one of its members, then the
19 statements thereafter knowingly made and the acts thereafter
20 knowingly done by any person likewise found by you to be
21 a member of the conspiracy can be considered by the jury
22 as evidence in the case as to any defendant found to be
23 a member of the conspiracy, even though the statements and
24 acts may have occurred in the absence and without the
25 knowledge of that defendant, provided that such statements

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1 lhh18

2 and acts were knowingly made and done during the
3 continuance of such conspiracy and in furtherance of some
4 object or purpose of the conspiracy. Thus, statements of
5 any conspirator which are not in furtherance of the con-
6 spiracy or which are made before its existence and after
7 its termination may be considered as evidence only against
8 the person making them. In that connection, I will charge
9 you that a conspiracy terminated with the arrest of each
10 of the individuals, if you find the conspiracy exists,
11 it terminates with the arrest, the ending of the purposes
12 of the conspiracy. If you find that the conspiracy existed
13 and that a particular defendant knowingly participated in
14 it, the extent of his participation has no bearing on
15 the question of guilt or innocence. The guilt or innocence
16 of the conspirator is not measured by the extent or duration
17 of his participation. Even if he participated in it to
18 a degree more limited than that of his co-conspirators,
19 he is equally culpable, so long as he was in fact a con-
20 spirator. If one joins a conspiracy after its formation,
21 engaged in it to a more limited degree than other co-
22 conspirators, he is equally culpable, so long as you find
23 beyond a reasonable doubt that he was in fact a co-conspirator.
24 Thus, each member of a conspiracy may perform separate
25 and distinct acts at different times and at different places.

1 lhh 19

2 Some conspirators may play major roles while others may play
3 minor roles. In other words, it is not required that a person
4 be a member of the conspiracy from its very start. He may
5 join it at any point during its progress and be held respon-
6 sible for all that has been done before he joined and all that
7 may be done before he joined and all that may be done there-
8 after during its existence and while he remains a member.
9 Simply stated, using the partnership analogy, by becoming
10 a partner he assumes all the liabilities of the partnership,
11 including those that occurred before he became a member.
12 Similarly, each conspirator need not know the identity or
13 the number of all his confederates. Conspirators may not
14 have previously associated together. One of the defendants
15 may know only one other member of the conspiracy. But if
16 he enters into an unlawful agreement with that other member
17 of the conspiracy, he becomes a party thereto. Nor is it
18 necessary that a defendant receive any pecuniary benefit
19 from his participation in the conspiracy, as long as he in
20 fact participated in it in the way I have instructed you.
21 The question is, did a defendant join the others with the
22 awareness of at least some of the basic purposes and aims of
23 the conspiracy? If so, then he adopts as his own the past
24 and future acts of all the other conspirators. A final word
25 on this second element, and I mentioned it just previously before,

1 lhh 20

2 I told you that a conspiracy once formed is presumed to have
3 continued until either its object was accomplished or
4 there is some affirmative act of termination by its members.
5 So too once a person is found to be a member of a conspiracy,
6 he is presumed to continue his membership therein until
7 its termination, and the burden is upon the conspirator
8 to satisfy you by affirmative proof that he withdrew and
9 disassociated himself from it. You will recall that I told
10 you that the conspiracy count of the indictment was divided
11 into two sections. I have explained the first section to you.

12 The second section refers to the so-called overt
13 acts. If you find beyond a reasonable doubt that the
14 alleged conspiracy existed and that the particular defendant
15 was a member of the conspiracy, you must then consider the
16 element, and that is the requirement of an overt act. The
17 overt acts referred to in count 1 are not separate charges.
18 They are part of the conspiracy count, and you may not find
19 a defendant guilty unless and until you are convinced beyond
20 a reasonable doubt that at least one of the overt acts charged
21 in the indictment was knowingly and wilfully committed by
22 at least the conspirators, and that one act at least was
23 committed, as I said before, in the Southern District of New
24 York. The offense of conspiracy is complete when the unlawful
25 agreement is made and any overt act is done by a conspirator,

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2 to, in the language of the statute, effect the object of the
3 conspiracy. Thus, an overt act is an act knowingly and
4 wilfully committed by one of the conspirators in an effort
5 to effect or accomplish some object or purpose of the con-
6 spiracy. The overt act need not be a criminal act or
7 an act which of itself constitutes an objective of the
8 conspiracy. It may be an act which is innocent on its face,
9 but it must be of such character that it furthers or promotes
10 or aids and assists in accomplishing a purpose of the con-
11 spiracy charged in the indictment. The indictment here reads
12 as follows, in continuation of the first count: In pursuance
13 of said conspiracy, and to effect the objects thereof,
14 the following overt acts were committed in the Southern
15 District of New York:

16 1. On or about October 12, 1973, defendant John
17 Benigno had a telephone conversation with an undercover agent.
18 The second alleged overt act as part of the conspiracy count,

19 2. On or about October 17, 1973, defendant Bryan
20 Canniff entered Friday's Restaurant at 1152 First Avenue,
21 New York, New York, and had a conversation with an undercover
22 agent. The alleged third overt act.

23 3. On or about October 17, 1973, defendant Bryan
24 Canniff delivered a package containing a "sample" of cocaine
25 to an undercover agent at 63rd Street near First Avenue,

1 lhh 22

2 New York, New York.

3 The fourth alleged overt act, on or about
4 October 17, 1973, defendant Bryan Canniff possessed a package
5 containing approximately 27.91 grams of cocaine. As I
6 previously indicated to you, the overt acts are not separate
7 charges, but in order to complete the charge of conspiracy,
8 you must find beyond a reasonable doubt that at least one
9 of those overt acts was done in the Southern District of
10 New York.

11 As to count 2, it reads as follows:

12 On or about the 17th day of October, 1973, in the
13 Southern District of New York, Bryan Canniff and John
14 Benigo, the defendants, unlawfully, wilfully and knowingly
15 did distribute and possess with intent to distribute a
16 Schedule 2 narcotic drug controlled substance, to wit,
17 approximately .34 grams of cocaine. Before you may find either
18 of the defendants or both of them guilty of the crime charged
19 in this count of the indictment, you must be satisfied
20 that the government has proven each of the following three
21 elements beyond a reasonable doubt. First, that on or
22 about the date charged, that is October 17, 1973, the de-
23 fendants did distribute and possess with intent to distribute
24 a narcotic drug controlled substance. The word possess as used
25 in this statute has its common everyday meaning, and that is

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1 lhh 23

2 simply to have something within your control. The law
3 recognizes two kinds of possession, actual and constructive.
4 A person who knowingly has direct physical control over a
5 third at a given time is then in actual possession of it.
6 A person who, though not in actual possession, has both
7 the power and the intention at a given time to exercise
8 dominion or control over a third, either directly or
9 through another person, is then in constructive possession
10 of it. Under the law, possession may be sole or joint.
11 If one person alone has actual or constructive possession
12 of a matter, possession is sole. If two or more persons
13 share actual constructive possession of an object, possession
14 is joint. The word "distribute" as used in the statute
15 means the actual constructive or attempted transfer of the
16 controlled substance.

17 The second element: If you find that the defendants
18 did distribute and possess with intent to distribute the
19 controlled substance, you must next determine whether or
20 not they did so unlawfully, wilfully and knowingly. An act
21 is done wilfully if done voluntarily and intentionally,
22 with a specific intent to do something the law forbids.
23 That is to say, with bad purpose either to disobey or disregard
24 the law. An act is done knowingly if done voluntarily
25 and intentionally, and not because of mistake, accident or

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1 lhh 24

2 other innocent reason. The purpose of adding the word
3 knowingly was to be sure that no one would be convicted
4 for an act done because of mistake, accident or other
5 innocent reason. With respect to the offense charged in
6 this case, the law requires that specific intent be proved
7 beyond a reasonable doubt before a defendant can be convicted.

8 The third element, if you are satisfied that the
9 first and second elements of the offense charged have been
10 proved beyond a reasonable doubt, you must then determine
11 whether or not the substance contained in Government's
12 Exhibit 1 was in fact cocaine. In this connection, I will
13 instruct you that as a matter of law cocaine is a narcotic
14 drug.

15 Count 3 reads as follows: The Grand Jury further
16 charges, on or about the 17th day of October, 1973, in the
17 Southern District of New York, Bryan Canniff and John Benigno,
18 the defendants, unlawfully, wilfully and knowingly did
19 possess with intent to distribute a Schedule 2 narcotic drug
20 controlled substance, to wit, approximately 27.91 grams
21 of cocaine. Before you may find either defendant guilty of
22 the crime charged in this count, you must be satisfied
23 that the government has proven each of the following three
24 elements beyond a reasonable doubt.

25 First, that on or about the date charged, that is

1 lhh 25

2 October 17, 1973, defendants did possess with intent to
3 distribute a narcotic drug controlled substance. Again, I
4 will reread to you the definition of the word possession.
5 It has its common everyday meaning. That is to have something
6 within your control, and there are two kinds of possession,
7 actual and constructive. A person who has direct physical
8 control over a thing at a given time is then in actual
9 possession of it. A person who, though not in actual
10 possession, has both the power and the intention at a given
11 time to exercise dominion or control over a matter or an
12 object, either directly or through another person, is then
13 in constructive possession of it. Possession may be sole or
14 joint. If one person alone has actual or constructive
15 possession of an object, possession is sole. If two or
16 more persons share actual or constructive possession, possession
17 is joint.. The word distribute as used in the statute means
18 the actual constructive or attempted transfer of the controlled
19 substance.

20 Second, if you find that the defendants did possess
21 with intent to distribute the controlled substance, you must
22 determine whether or not they did so unlawfully, wilfully
23 and knowingly. The same considerations that I told you
24 with respect to wilfully, knowingly, as I charged you pre-
25 viously, apply in connection with this. Further satisfied

1 lh 26

2 that the first and second elements of the offense charged
3 have been proved beyond a reasonable doubt, you must then
4 determine whether or not the substance contained in Government's
5 Exhibit 2 was in fact cocaine, and I instruct you again,
6 as I have before, that cocaine is a narcotic drug. With
7 respect to defendant John Benigno in counts 2 and 3, the
8 government relies upon a statute which reads in relevant part
9 as follows:

10 "Whoever commits an offense or aids, abets or
11 counsels, commands, induces or produces its commission is
12 punishable as a principal." This means that not only is the
13 person who actually commits an illegal act, that is the
14 principal, responsible, but anyone who aids and abets him
15 in committing that illegal act is likewise punishable.
16 Accordingly, you may find the defendant John Benigno guilty
17 of the offense charged in counts 2 and 3 of the indictment,
18 if you find -- or any one of them -- if you find beyond
19 a reasonable doubt that the offense was committed and that
20 the defendant aided and abetted in its commission. To aid
21 and abet does not mean just knowing that a crime is being
22 committed, even if one is present during its commission.
23 That alone is not sufficient. In order to find that a
24 defendant aided and abetted another to commit a crime, you must
25 be satisfied beyond a reasonable doubt that he knowingly, in

1 lhh 27

2 some substantial measure, associated himself with the venture,
3 that he participated in it as something he wished to bring
4 about, and that he sought by his actions to make it succeed.
5 In other words, if one is fully aware of what he is doing
6 plays a significant role in facilitating a transaction
7 prohibited by law, he is equally guilty with a person who
8 directly performs the illegal act, even though the latter
9 played a greater or much larger role in the perpetration
10 of the crime. The evidence of a defendant's participation
11 may be circumstantial, from which you may conclude that a
12 defendant as an aider and abettor was a participant in a
13 crime charged. A single act may come within the prohibition
14 of the aiding and abetting law. Whether one aided and abetted
15 another to commit a crime must be determined solely upon
16 the alleged aider and abettor's own conduct, acts and statements.
17 As I told you in connection with your selection as jurors
18 in this case, the defendant Bryan Canniff asserts that he
19 was a victim of entrapment as to the crimes charged in the
20 indictment. Where a person has no previous intent or purpose
21 to violate the law, but is induced or persuaded by law
22 enforcement officers or their agents to commit a crime, he
23 is a victim of entrapment, and the law as a matter of
24 policy forbids his conviction in such a case. On the other
25 hand, where a person already has the willingness and readiness

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1 lhh 28

2 to break the law, the mere fact that government agents
3 provide what appears to be a favorable opportunity is
4 not entrapment. It is not entrapment for a government agent
5 to pretend to be someone else and to offer either directly
6 or through an informer or other decoy to purchase narcotics
7 from such suspected person. Entrapment occurs only when the
8 criminal conduct was the product of the creative activity
9 of the law enforcement officials or their agents. That is,
10 if they negotiate, incite, induce, persuade or lure an
11 otherwise innocent person to commit a crime and to engage
12 in criminal conduct; and if that occurs the government
13 may not avail itself of the fruits of this instigation. In
14 this regard, the defendant Bryan Canniff asserts that he was
15 induced to violate the law by the activities of Danny Miller,
16 a government informant, by Miller's actions and direct dis-
17 cussions with him. If then you, the jurors, should find
18 beyond a reasonable doubt from the evidence in the case that
19 before anything at all occurred respecting the alleged
20 offenses involved in this case, the defendant was ready and
21 willing to commit crimes such as charged in the indictment
22 whenever opportunity was afforded, and that government officers
23 or their agents did no more than offer the opportunity, then
24 the jury should find that the defendant is not a victim of
25 entrapment. On the other hand, if the evidence in the

1 lhh 29

2 case should leave you with a reasonable doubt whether
3 the defendant had the previous intent or purpose to commit
4 any offense of the character here charged, and did so
5 only because he was induced or persuaded by some information
6 or agent of the government, then it is your duty to acquit
7 him. I have mentioned the words reasonable doubt quite
8 frequently. I have told you that a defendant was presumed
9 innocent and that the presumption of innocence remains with
10 the defendant unless and until you are unanimously convinced
11 of guilt beyond a reasonable doubt. In describing the
12 various elements of the offense charged, I told you the
13 government must establish each of those elements by proof
14 beyond a reasonable doubt. The question naturally arises,
15 what is a reasonable doubt. The words almost define them-
16 selves; that there is a doubt founded in reason and arising
17 out of the evidence or lack of evidence. It is a doubt which
18 a reasonable person has after carefully considering all the
19 evidence. A reasonable doubt is not a vague, speculative
20 or imaginary doubt. It is not caprice, whim or speculation.
21 It is not an excuse to avoid an unpleasant duty. It is
22 not sympathy for a defendant. A reasonable doubt is a doubt
23 which appeals to your reason, your common sense, your experience
24 and your judgment. It is a doubt which would cause a
25 reasonable man or woman like yourselves to hesitate to act in

1 lhh30

2 relation to your own important private affairs. Mere sus-
3 picion will not justify conviction. Suspicion is not a
4 substitute for evidence nor is it sufficient to convict
5 if you find that the circumstances merely render an accused
6 probably guilty. On the other hand, it is not required
7 that the government must prove guilt beyond all possible
8 doubt, but the proof must be of such convincing character
9 that you would be willing to rely an act on it in the im-
10 portant affairs of your own life. In sum, a reasonable doubt
11 exists when after a careful and impartial consideration of
12 all the evidence before you, you can candidly and honestly
13 state that you do not have an abiding conviction that a
14 defendant is guilty of the charge. I told you at the beginning
15 of the trial that your most important function would be
16 to assess the credibility of the witnesses who testified.
17 I have also told you that you as jurors are the sole judges
18 of the credibility of the witnesses. You and you alone must
19 determine what weight their testimony deserves. In my in-
20 structions to you at the start of the case, I gave you some
21 guidelines I thought might be helpful to you as the case unfolded,
22 and I am going to repeat and expand on those instructions
23 at this point. Preliminarily, you are to understand that
24 you should not be influenced by the number of witnesses called
25 by either side. The weight of the evidence is not determined

1 lhh 31

2 by the number of witnesses testifying on either side. Rather
3 you should consider all the facts and circumstances in
4 evidence to determine where the truth lies. In assessing
5 credibility, you should carefully scrutinize the testimony
6 given, the circumstances under which each witness has
7 testified and every matter in evidence which tends to
8 indicate whether the witness is worthy of belief. The
9 degree of credibility to be given to a witness should be
10 determined by his demeanor on the stand, his relationship
11 to the controversy and the parties, his bias or impartiality,
12 the reasonableness of his statements, the strength or weakness
13 of his recollection viewed in the light of all other
14 testimony and the attendant circumstances in the case, and
15 the extent to which, if at all, each witness is either sup-
16 ported or contradicted by other evidence. How did the
17 witness impress you? Did his version appear straightforward
18 and candid or did he try to hide some of the facts? Is there
19 a motive to testify falsely? In passing upon the credibility
20 of a witness, you may take into account inconsistencies
21 or contradictions as to material matters in his own testimony
22 or any conflict with that of another witness. Also any
23 omissions or inconsistencies in prior testimony or any prior
24 statement with respect to material matters as to which he
25 may have testified upon the trial. Inconsistencies or

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1 lhh32

2 discrepancies in the testimony of a witness or between the
3 testimony of different witnesses may or may not cause an
4 injury to discredit such testimony. Two or more persons
5 witnessing an incident or a transaction may see or hear it
6 differently. An innocent misrecollection like failure of
7 recollection is not an uncommon experience. A witness may be
8 inaccurate, contradictory or untruthful in some respects
9 and yet be entirely credible in the essentials of his testi-
10 mony. In weighing the effect of a discrepancy, consider
11 whether it pertains to a matter of importance or an unimportant
12 detail and whether the discrepancy results from innocent
13 error or wilful falsehood. If you find that any witness
14 has testified falsely, you can do one of two things. You can
15 either reject all of that witness' testimony on the ground
16 that it is all tainted by falsehood and that none of it is
17 worthy of belief or you can accept that part which you believe
18 to be credible and reject only that part which you believe
19 to be tainted by falsehood. Should you find that all or any
20 part of a particular witness' testimony was false, you may not,
21 of course, infer that the opposite of that testimony is the
22 truth, unless there is other evidence to that effect. Any
23 testimony rejected by you as false is no longer in the case
24 insofar as any finding that you may make is concerned, and
25 you will recall that I told you that an inference was merely

1 lh 33

2 a conclusion which reason or common sense leads you to
3 draw from the facts which you find have been proven. Thus,
4 a finding of fact may not be established merely by a negative
5 inference arising from your disbelief and rejection of any
6 testimony. In passing upon credibility, the ultimate question
7 for you to decide is did the witness tell the truth here
8 before you. It is for you to say whether his testimony at
9 this trial was truthful in whole or in part in the light
10 of his demeanor, his explanations and all the evidence in
11 the case. I told you at the outset that the law does not
12 require a defendant in a criminal case to testify or present
13 any evidence in his own behalf. When as here a defendant
14 does testify, it is your function to assess his credibility
15 in the same manner as you assess the credibility of any other
16 witness. You will recall that when I instructed you that
17 one factor to be considered in judging credibility is any
18 interest a witness may have in the outcome of the trial. Ob-
19 viously, every defendant has a personal interest in the outcome
20 of the case.

21 In appraising his credibility, you may take the
22 fact of interest into consideration. However, it by no means
23 follows that simply because a person has a substantial interest
24 in the result he is not capable of telling a straightforward
25 or truthful story. It is for you to decide to what extent,

1 lhh 34
2 if at all, his interest has affected his testimony. Evidence
3 relating to any statement claimed to have been made by
4 a defendant outside of court and after a crime has been
5 committed should be considered with caution and weighed
6 with care. All such evidence should be disregarded
7 entirely unless the evidence in the case convinces you
8 beyond a reasonable doubt that the statement was knowingly
9 made. I have previously informed you that a statement
10 is knowingly made if done voluntarily and intentionally,
11 and not because of mistake or accident or other innocent
12 reason. In determining whether any statement claimed to
13 have been made by a defendant outside of court and after
14 a crime has been committed was knowingly made, you should
15 consider the age, training, education, occupation and physical
16 and mental condition of the defendant and his treatment while
17 in custody or while under interrogation as shown by the evidence
18 in the case, and also all other circumstances and evidence
19 surrounding the making of the statement, including whether
20 before the statement was made the defendant knew or who had
21 been told and understood that he was not obligated or required
22 to make the statement claimed to have been made by him,
23 that any statement which he might make should be used against
24 him and could be used against him in court, that he was
25 entitled to the assistance of counsel before making any

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1 lhh 35

2 statement, either written or oral, and that if he was without

3 money or means to retain counsel of his own choice, an

4 attorney would be appointed to advise and represent him

5 free of cost of obligation. If the evidence in the case

6 does not convince you beyond a reasonable doubt that the

7 statement was voluntarily and intentionally made, you should

8 disregard it entirely. On the other hand, if the evidence

9 in the case does show beyond a reasonable doubt that a state-

10 ment was in fact voluntarily and intentionally made by a

11 defendant, you may consider it as evidence in the case

12 against the defendant who voluntarily and intentionally

13 made the statement. There has been testimony here with respect

14 to the use by agents of the Drug Enforcement Administration

15 of the services of a person referred to an informant. These

16 services are availed of by government agents to obtain leads

17 to persons suspected of violating the law. Whether or not

18 you approve the use of an informant in an effort to detect

19 law violation is not to enter into your deliberations. The

20 testimony of an informer who provides evidence against

21 a defendant for vindication or pay must be examined and

22 weighed by the jury with greater care than the testimony of

23 an ordinary witness. The jury must determine whether the

24 informer's testimony has been affected by interest or by

25 prejudice against a defendant. There has been character

1 lhh 36

2 evidence offered in this case on behalf of the defendant
3 Canniff of general good reputation for truth and veracity
4 which should be considered by you along with all the other
5 evidence in the case. Evidence of a defendant's reputation
6 inconsistent with those traits of character ordinarily
7 involved in the commission of a crime charged may give
8 rise to reasonable doubt, since you may think it improbable
9 that a person of good character in respect to those traits
10 who commit such a crime. With respect to absent witnesses,
11 if it is peculiarly within the power of either the prosecution
12 or the defense to produce a witness who could give material
13 testimony on an issue in the case, the failure to call that
14 witness may give rise to an inference that his testimony
15 would have been unfavorable to that party. However, no
16 such conclusion should be drawn by you with regard to a
17 witness who was equally available to both parties or where
18 the witness' testimony would be merely cumulative; both
19 sides have the right to interview witnesses at any time
20 before or during the trial. Both sides have the right to
21 subpoena or request witnesses to appear in court, and you
22 will bear in mind what I have told you before, that the law
23 never imposes upon a defendant in a criminal case the burden
24 or duty of calling any witnesses or producing any evidence.
25 I have used the words knowledge and intent as an element of

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1 lhh37

2 the crime during the course of my charge. An act or a
3 failure to act is knowingly done if done voluntarily and
4 intentionally, and not because of mistake or other innocent
5 reason. A little further comment may be helpful. Knowledge
6 and intent exist in the mind. As we all realize, it is im-
7 possible to look into a man's head to see what goes on in
8 his mind. The only way you have for arriving at a decision
9 on these questions is for you to take into consideration
10 all the facts and circumstances shown by the evidence and
11 to determine from all such facts and circumstances whether
12 the requisite knowledge and intent were present at the time
13 in question. Direct proof is unnecessary. Knowledge and
14 intent may be inferred from all the surrounding circumstances.
15 In your deliberations, please do not discuss the question
16 of possible punishment. That is a matter that rests on
17 my conscience and my conscience alone, because the judge
18 and the judge alone is the one who has the obligation of
19 imposing sentence when and if guilt is determined. If
20 you discuss it among yourselves, you will be encroaching upon
21 my function, and I ask you not to do it. Your function is
22 to consider the facts and to determine the facts. My function
23 is to pass upon the law, and in the event of a conviction
24 to impose sentence. If you find on all the evidence that
25 the evidence respecting a defendant leaves a reasonable

A41

1 lh38

2 doubt as to his guilt, you should not hesitate for a moment
3 to return a verdict of not guilty as to that defendant.

4 However, on the other hand, if you find that beyond a
5 reasonable doubt that the law has been violated as charged,
6 you should not hesitate because of sympathy or because of
7 any other reason to render a verdict of guilty. The verdict
8 must represent the considered judgment of each juror.

9 In order to return a verdict it is necessary that each juror
10 agree thereto. That is your verdict must be unanimous. It
11 is your duty as jurors to consult with one another and to
12 deliberate with a view to reaching an agreement, if you can
13 do so without violence to individual judgment. Each of you
14 must decide the case for yourself, but do so only after an
15 impartial consideration of the evidence with your fellow
16 jurors. In the course of your deliberations, do not hesitate
17 to reexamine your views and change your opinion if convinced
18 that it is erroneous. Do not surrender your honest con-
19 viction as to the weight or effect of evidence solely because
20 of the opinion of your fellow jurors or for the mere purpose
21 of returning a verdict. You are not partisans, you are
22 judges, judges of the facts. Your sole interest is to
23 ascertain the truth from the evidence in the case. As I have
24 indicated before, if any reference by the court or counsel
25 to matters of evidence does not coincide with with your own

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1 lhh39

2 recollection which controls during your deliberations. If
3 it becomes necessary during your deliberations to communicate
4 with the court, you may send a note by the marshal, signed
5 by your foreman or by one or more members of the jury. No
6 member of the jury should ever attempt to communicate
7 with the court by any means other than a signed writing,
8 and the court will never communicate with any member of the
9 jury on any subject touching the merits of the case, otherwise
10 than in writing or orally here in open court. You will note
11 from the oath about to be taken by the marshals that they
12 too, as well as all other persons, are forbidden to com-
13 municate in any way or manner with any member of the jury
14 on any subject touching the merits of the case. Bear in
15 mind also that you are never to reveal to any person, not
16 even to the court, how you stand numerically or otherwise
17 on the question of the guilt or innocence of the accused
18 until after you have reached a unanimous verdict. It is
19 appropriate for counsel to take exception as to any of
20 the charges that I have made or if I have omitted to
21 instruct you as to certain portions of the law to request
22 that I do so here, and I will take those requests right
23 here at the side bar.

24 (At the side bar.)

25 THE COURT: Before you get started, gentlemen, I

1 lhh 40

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2 did not read in my charge the applicable statute on 841A and
3 B, but I did charge them that it was--

4 MR. MITCHELL: I am waiving it.

5 MR. KRIEGER: Fine.

6 THE COURT: I did want to let you know that I
7 did charge a violation of the narcotics laws. I think that
8 is sufficient here. If you want something further--

9 MR. KRIEGER: No, your Honor.

10 MR. MITCHELL: No.

11 THE COURT: Any exceptions?

12 MR. MITCHELL: No.

13 MR. KRIEGER: No.

14 THE COURT: Your Honor, this has arisen in the past--

15 THE COURT: Does the government have any ex-
16 ceptions?

17 MR. PEDOWITZ: Your Honor, I had one problem
18 and that was I don't think you instructed the jury that
19 the Southern District of New York is in Manhattan.

20 MR. KRIEGER: You did.

21 THE COURT: Several times.

22 MR. PEDOWITZ: I missed it.

23 THE COURT: Manhattan, New York County I said.

24 MR. MITCHELL: Your Honor, this has arisen in
25 the past in entrapment cases. I would ask your Honor to

1 lhh 41

2 instruct the jury that Miller cannot be considered a co-
3 conspirator, because sometimes they go out there and they
4 flounder around and they come back with a question, is the
5 informer a co-conspirator. He is not. I think the jury
6 should be so instructed.

7 MR. PEDOWITZ: Your Honor, if the jury flounders
8 about and sends a note in --

9 THE COURT: No, it is not a question of whether
10 they are floundering. I am not familiar with that.

11 MR. MITCHELL: I would like that.

12 THE COURT: Is that the law?

13 MR. PEDOWITZ: I am confident that an informant
14 is not a co-conspirator.

15 THE COURT: I think I should charge that.

16 MR. CURIANSKY: Your Honor, I think you made
17 that quite clear to them in charging them with respect
18 to the entrapment defense, that he was acting as a government
19 agent. There is hardly any question but that he was working
20 for the government throughout this whole thing. I think you
21 made that eminently clear to them. As did defense counsel
22 throughout the entire case. To call attention to it now
23 I think singles it out for unnecessary attention.

24 THE COURT: All right. It is obvious that a
25 government agent can't be a co-conspirator because he never

1 lhh 42

2 intends to violate the law. By the very definition of
3 the conspiracy he is not a conspirator.

4 MR. MITCHELL: I ask your Honor to instruct
5 the jury that if entrapment is believed as a defense, it
6 applies to all three counts.

7 THE COURT: I did charge that.

8 MR. MITCHELL: I would ask your Honor, in your
9 charge on credibility, to charge that a person who has
10 been convicted of a crime, that can be considered as a
11 against their credibility, as in the case of Miller.

12 THE COURT: All right. Is it satisfactory
13 if I charge them that in connection with the unavailability
14 of a witness, you may take into account-- in assessing
15 credibility, you may take into consideration the fact that
16 a person has been convicted of a felony as bearing upon his
17 credibility?

18 MR. PEDOWITZ: That's right.

19 THE COURT: Is that satisfactory?

20 MR. MITCHELL: Yes. There is one other thing.
21 Your Honor instructed the jury that counsel had the right
22 to interview a witness. This has happened time and again.
23 Miller, who was a witness, if we were to want to interview
24 him, he would tell us --

25 THE COURT: You had the right to interview him.

1 1hh 43

2 MR. MITCHELL: But also the government instructs
3 him not to talk.

4 THE COURT: You could have brought that out if
5 you wanted to. I will not do that.

6 MR. PEDOWITZ: I will make a representation
7 on the record that I spoke to Daniel Miller and I told him
8 that if he was confronted by counsel and asked any questions,
9 he had the perfect right to answer the questions or not to
10 answer the questions.

11 MR. MITCHELL: I have had cases here where when
12 you produced a witness--

13 THE COURT: Not going to do it. You had the right
14 to make an application to have him available.

15 MR. PEDOWITZ: I would never do that, your Honor.

16 THE COURT: They still had the right to do it.

17 MR. MITCHELL: You used, in reasonable doubt,
18 you used the term from the evidence or lack of evidence. Many
19 times during the charge you said to them that they could find
20 so and so from the evidence. I wish you would say that at
21 all times it is from the evidence or lack of evidence.

22 THE COURT: I refuse to charge except as I have
23 charged. This charge was given to you and available to
24 you yesterday.

25 MR. MITCHELL: I have nothing further.

1 1hh 44

2 MR. KRIEGER: One request, your Honor.

3 THE COURT: This charge was made available to
4 everybody yesterday, you had the opportunity to look at it
5 and make any suggestions that you wanted to. I am surprised
6 to get these at this point.

7 MR. KRIEGER: One very minor query, your Honor.
8 Would your Honor be good enough to charge if the jury believes
9 the defense of entrapment under any or all of the three
10 counts -- under the conspiracy count, then Canniff would
11 not be deemed a co-conspirator.

12 THE COURT: No, I can't charge that.

13 MR. PEDOWITZ: May I make the request once more
14 with respect to character witnesses that you charge this
15 particular sentence?

16 THE COURT: No. I will charge as I have charged.

17 MR. KURIANSKY: Your Honor, one additional request.
18 As I understand, you are going to make some comment now
19 about conviction of a felony?

20 THE COURT: Yes.

21 MR. KURIANSKY: I would just ask if you are going
22 to make special mention of that now that you also state that
23 that in and of itself is not a reason for disbelieving
24 a witness, as you did in general comment.

25 THE COURT: No. I am just going to go back and

1 lhh 45

2 say that I omitted to do this, You shouldn't take any
3 special note of it by reason of the fact that I didn't
4 include it before, but in assessing credibility you may
5 take into account the fact that a person has been convicted
6 of a felony.

7 (In open court.)

8 THE COURT: Members of the jury, sorry that we took
9 a few minutes away from you, but it is a routine matter that
10 we go through. I neglected in connection with one portion
11 of my charge to fully charge you about it. You shouldn't
12 take any significance out of the fact that I am charging
13 it to you now rather than at the particular time. Take it
14 in consideration with what I should have charged at that time.
15 When I charged you about credibility, what you look for
16 in connection with credibility, I neglected to tell you that
17 you could also take into consideration in assessing a person's
18 credibility and give whatever weight you wish to give to it
19 the fact that a person has been convicted of a felony.
20 You may take that into consideration when assessing
21 credibility. It should have been in the regular charge
22 and you should take no consideration of it by reason of
23 the fact that I am charging you on this now. I would like
24 to thank with a great deal of satisfaction the alternate
25 jurors being here with us and the attention that you gave

1 lhh 46

2 to this case and being present. Your presence here was
3 more important, it was as important as everybody else's
4 in this case. Thank you so much for your consideration in
5 this case, but your services are at an end so far as we
6 are concerned.

7 (Two alternate jurors were excused.)

8 THE COURT: Members of the jury, while they are
9 doing that and we are here for a moment, I have prepared
10 for you a form of verdict which will assist you when you report
11 your verdict back into court, and it is a very simple matter.
12 It says on count 1 we find the defendant Bryan Canniff,
13 and it is blank, and it goes through each count as to each
14 defendant, and, of course, when you report your verdict
15 you will report on count 1 we find the defendant Bryan
16 Canniff-- unanimously find the defendant Bryan Canniff
17 whatever it is, and so forth. I am also giving you a copy
18 of the indictment to take with you. In about half an hour,
19 or so, we will furnish you with menus so that you may order
20 lunch, and lunch will take about an hour to get to you. Don't
21 let it interfere with your deliberations. However, I do suggest
22 that when your lunch does come, that you do take the time
23 out to enjoy it. You are in charge of your own discussions
24 and your own deliberations and how you should conduct them,
25 but in about half an hour we will have available for you menus.

A50

1 lhh 46a

2 (One marshal was duly sworn.)

3 (Jury commenced deliberations at 11:30 A.M.)

4 --

KRIEGER - USA V. BENIGNO

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 16 day of May, 1975 deponent served the within *Appendix* upon U.S. Atty., Southern Dist. of NY

attorney(s) for Appellee

in this action, at

U.S. Courthouse, Foley, Square, New York, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....*Robert Bailey*.....
ROBERT BAILEY

Sworn to before me, this
16 day of May, 1975.

William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976